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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 411

CAULDWELL-WINGATE COMPANY, INC., POIRIER & MCLANE CORPORATION and PORT CHESTER ELECTRICAL CONSTRUCTION CORPORATION,

Petitioners and Appellees Below,

against

MARY E. PERSON, as Administratrix of the Goods, Chattels and Credits of WILLIAM S. PERSON, Deceased,

Respondent and Appellant Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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October , 1949.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, three corporations organized under the laws of the State of New York, pray this Court for the issuance of a writ of certiorari to the United States Court of Appeals for the Second District, to review a decision of said Court dated the 5th day of July, 1949, which reversed a judgment of the U. S. District Court for the Southern District of New York, dated the 2nd day

of December, 1948, and remanded this cause for a new trial in accordance with its decision.

A petition for rehearing was denied on the 25th day of July, 1949.

Statement of the Matter Involved

This is an action at law brought in the U. S. District Court for the Southern District of New York by respondent herein against petitioners to recover damages for the death of her intestate alleged to have been caused through the negligence of the three petitioners.

The District Court acquired jurisdiction by reason of the diversity of citizenship between respondent and the petitioners.

Cauldwell-Wingate Company and Poirier-McLane Corp., as general contractors under a contract with the United States Army Engineers, erected and constructed Camp Shanks (a war training center) (fol. 14). The general contractors, subcontracted to Port Chester Electrical Construction Corp. (hereinafter referred to as Port Chester) the construction and installation of an outside electrical distribution system at the camp. The electrical distribution system was installed in accordance with plans and specifications of the U. S. Army Engineers (fol. 980). Part of that system was a pole known as pole #1422 which supported two high tension wires. The wires were supported on both sides of the pole by a bolt which ran through the pole. The pole was insulated at both ends of the wires by two dead end Bell insulators. The current was carried across the pole by a wire known as a jumper. It was at this pole, that respondent's intestate met his death. The pole had become electrified because in some unknown fashion, the jumper had come into contact with a metal plate to which a guy wire supporting the pole was attached (fol. 615).

The entire electrical distribution system including pole 1422 was completely installed on May 15, 1943 (fol. 988). From that date on, the contractors had no contact with the said electrical distribution system and were not again on the premises on Camp Shanks. The system was thereafter maintained, operated, repaired, inspected and supervised by the United States Government and its agents, servants and employees (fol. 534).

On August 6, 1946, respondent's intestate while in the employ of James E. Smith & Co., an independent contractor, climbed pole 1422, for the purpose of installing a temporary line to a building known as 041. He there met his death through electrocution.

A period of approximately three years and three months had elapsed between the date when petitioners had completed the electrical distribution system and delivered the same to the U. S. Army Engineers, who accepted it, and the date when the respondent's intestate climbed the pole and was killed.

The guy wire above the strain insulator had become energized with 2300 volts of electricity as a result of the jumper which had been installed by Port Chester, having in some unexplained manner sagged and come in contact with the metal plate attached to bolt to which the guy cable was fastened (fol. 564). The guy cable in question was bolted to the pole six inches below the primary line, and there was a plate or square washer used in connection with the through-bolt to which this guy cable was attached (4th paragraph of report of Clarence J. Burton, Defendant's Exhibit G).

When the jumper was installed, it was not fastened to a pole top pin or any similar device. During the period of three years while Burton was in charge of electrical maintenance in the camp, he periodically inspected the electrical system, including the high tension wires and

jumper fastened to Pole 1422, and at no time did he observe or find anything wrong with same (fol. 652).

Immediately after the accident when Burton examined the jumper, he found nothing wrong with it or with the clamps by which it was fastened to the high tension wires, and he replaced the bolt and jumper with a similar bolt and jumper and placed the new jumper in the same position the old jumper had been. The replaced jumper was still being used on Pole 1422 at the date of the trial (fols. 921-923).

When Burton replaced the jumper he did not fasten it to a pole top pin or side pole pin (fol. 923).

A strain insulator was built into the guy cable in question some eighteen or twenty feet above the ground. The purpose of this strain insulator was to protect the public from injury in the event the guy cable would become charged with electricity from the high tension wires (fol. 184).

There was not a scintilla of evidence adduced at the trial that the jumper was installed in violation of any electrical or municipal safety code, or was a hidden defect that could not be readily discerned by a casual inspection.

The trial was by jury, and at the close of respondent's case, petitioners rested and moved for a directed verdict, which motions were granted (fols. 1234-1245), and judgment was entered in favor of petitioners and against respondent on the 2nd day of December, 1948 (fols. 1255-1257).

Respondent appealed from said judgment to the United States Court of Appeals for the Second Circuit, which reversed the judgment of the lower court, and remanded this cause for a new trial in accordance with its opinion, which holds:

a. That the State of New York imposes the same duty towards a "business visitor" which it imposes upon the owner of land, on a contractor, who has negligently installed for the owner an electrical system, in acordance with plans and specifications furnished by the owner, after said contractor had completed the work, which had been inspected, approved, and accepted by the owner, who was in sole control of said electrical system at the time of the accident; and upon proof of original negligent installation, the contractor continues liable for damages sustained by such "business visitor" (pages 1642-43 of opinion).

b. That the subsequent negligence of the owner in not maintaining such system in a reasonably safe condition does not exonerate the contractor from liability, but such owner's negligence must be determined, as though such omission was innocent in itself (pages 1644-45 of opinion).

c. Applied the rule of *res ipsa loquitur* against a party who was not in control of the instrumentality which caused the injury.

Opinion Below

The District Court did not write an opinion. The opinion of this court of appeals is reported in 176 Fed. (2nd) 237

Jurisdictional Statement

The jurisdiction of this Court is invoked under Section 240 (a) under the Judicial Code as amended.

The U. S. Court of Appeals remanded this case for retrial to be held in conformity with its decision which

has ruled upon the application of the State Law to the issues involved. It is contended that the Supreme Court has jurisdiction to review the judgment herein because such rulings are fundamental to the further conduct of this case and therefore should be reviewed on certiorari (*U. S.* v. *General Motors Corp.*, 323 U. S. 373); because the decision of the U. S. Court of Appeals is in conflict with the laws of the State of New York as established by the decisions of the New York Court of Appeals; and because it is also in conflict with the decisions of this Court in that it has been held in the Court below that a contractor who had negligently installed a dangerous instrumentality is independently liable in perpetuity thereafter for any injury resulting from a defect in the original installation; that this independent liability persists although the contractor, at the time of injury; did not own or operate, was not in control of and had no opportunity or duty to repair or maintain said instrumentality.

The decision of the U. S. Court of Appeals is in apparent conflict with the following decisions of the courts of the State of New York, and of this court. *Kilmer* v. *White*, 254 N. Y. 64; *Wilks* v. *New York Telephone Co.*, 243 N. Y. 351; *Zolezzi* v. *Bruce-Brown*, 243 N. Y. 490-498; *Covert* v. *Cranford*, 141 N. Y. 521; *Virginia Railway Co.* v. *Mullins*, 271 U. S. 220; *Western Union Telegraph Co.* v. *Poston*, 256 U. S. 662.

The question involved is important and the law as it now stands presents an apparently wide and irreconcilable conflict between the State and Federal laws on a fundamental and important principle of law.

Questions Presented

1. Is the decision of the U. S. Court of Appeals in conflict with the law established by the N. Y. Court of Appeals affecting the liability of a general contractor for original negligent construction?

2. Is the decision of the U. S. Court of Appeals in conflict with the New York laws as established by the N. Y. Court of Appeals, in holding that an electrical contractor, who has negligently installed and turned over to an owner an electrical distribution system, which had been inspected, approved and accepted by the owner, who thereafter remains in sole control of the instrumentality, liable to a "business visitor" of the owner for injuries sustained by such "business visitor" of the owner and that such contractor owes the same degree of care to such "business visitor" which is imposed upon the owner of the premises to a "business visitor"?

3. Is the decision of the Court of Appeals in conflict with the law of the State of New York in holding that the subsequent negligence of the owner in not maintaining an electrical system in a reasonably safe condition would not insulate the contractor who installed said system from liability, but such owner's negligence must be determined as though it was innocent in itself?

4. Is the decision of the Court of Appeals in conflict with the law of New York in holding under the facts of the instant case that the rule of *res ipsa loquitur* applied against a party who is not in possession or in control of the instrumentality which caused the injury.

Conclusion

As unquestionably the Court of Appeals has extended the contractor's liability to an extent not covered by New York State decisions, but in conflict with them, and since the questions presented are of general importance, because if decision below is sustained, every electrical contractor who installs a dangerous instrumentality when figuring the cost of an installation will have to take into consideration the necessity of protecting himself by continuing li-

ability insurance, and since the decision below conflicts with the decisions of the New York Court of Appeals on the questions involved, the petition for a writ of certiorari should be granted.

Dated, October 10, 1949.

Respectfully submitted,

WILLIAM A. DAVIDSON,
Attorney for Petitioners.

PETITIONERS' BRIEF

The facts are sufficiently stated in the petition.

Jurisdiction

If the decision of the U. S. Court of Appeals was a finding, only that a triable issue had been raised and that therefore the Trial Court erred in directing a verdict, this application would be unnecessary. However, the decision of the Court of Appeals has gone far beyond a direction for a new trial. It has held that in this case, that the contractor's duty was co-equal with that of a land owner towards a "business visitor"; that subsequent negligence of the owner would not insulate the contractor from liability and that the rule of *res ipsa loquitur* was applicable to a contractor who was not in control of the instrumentality causing the injury. The inclusion of such rulings in the decision establish the law of the case and thus become binding upon the District Court upon a retrial.

If, as claimed here, these rulings are wrong, petitioners' failure to appeal at this time would result in the great expense of another trial, the probability of a practically directed verdict against these defendants and subsequent appeals, necessitating in all probability, an appeal to this Court. It is apparent, therefore, that the correctness of these rulings of the Court of Appeals are so fundamental to the further conduct of this case that they should be reviewed on certiorari (*U. S.* v. *General Motors Corp.*, 323 U. S. 373).

This decision should also be reviewed because it is in conflict with the decisions of the N. Y. Court of Appeals and of this Court.

The U. S. Court of Appeals relied upon, but erred in applying, the facts and principles of law as stated in *Wilks*

v. *N. Y. Telephone Co.*, 243 N. Y. 351. In referring to the *Wilks* case, said Court stated:

> "The facts in the case were strikingly like those at bar" (p. 1643).

The facts stated by the New York Court of Appeals indicate the contrary. The U. S. Court of Appeals stated:

> "* * * the Federal Company had installed a dangerous wiring system upon its *own* property, * * *" (Italics supplied) (p. 1643).

But the New York Court of Appeals stated:

> "The complaint herein charges in effect that the Federal Telephone and Telegraph Company erected wires across the premises leased by the deceased *without permission or right* or easement and was a *trespasser on such premises;* * * *" (Italics supplied) (p. 357).

The *Wilks* case, therefore, involved a trespass and an apparently harmless telephone wire, and not a jumper required to be attached to a high tension wire.

Another vital distinction between the facts in the instant case and in the *Wilks* case is also apparent. The New York Court of Appeals stated:

> "The position of the Federal Telephone and Telegraph Company is different. It constructed a telephone system for operation *under a public franchise.* It was under a *duty to the public* to use care in the construction of its wires; it was under a similar *duty to use care in their maintenance.* It voluntarily conveyed its property to the New York Telephone Company" (p. 362) (Italics supplied).

Neither of the defendants in this case constructed the electrical system in question for their own use and opera-

tion or under a public franchise; the system was erected not for the use of the general public, but for the use of the War Department, and defendants had no right or duty to operate or maintain the system; and no voluntary conveyance was involved.

The New York Court of Appeals followed the law, which has been uniformly upheld in this jurisdiction, that, in order for a contractor to be liable in any event when he ceased to have control of the operation and maintenance of an instrumentality, it must be shown that the construction in question created a nuisance. It is respectfully submitted that the U. S. Court of Appeals erred in declaring that:

> "The fact that the Court called the wiring 'a nuisance' is not important in this action" (Opinion, p. 1643).

It was not only important, but vital that the wiring was determined to be a nuisance, for only then could the New York rule of perpetual liability in certain nuisance cases apply, as this rule does not apply to negligent construction by a contractor. *Covert* v. *Cranford,* 141 N. Y. 521; *Mayor* v. *Cunliff,* 2 N. Y. 174. In the instant case, the U. S. Court of Appeals has not determined that there was any evidence in the record to support a jury finding that the alleged defective construction constituted a nuisance, and plaintiff has not proceeded upon any theory of nuisance.

The U. S. Court of Appeals further applied the test of liability as established in actions where the injury occurred during the progress of the work, and not, as here, more than three years after the completion thereof and during the maintenance, operation and control by a third person, stating "That appears to us an altogether proper step to take" (p. 1642). It is submitted that the taking of the step is not a proper one. The law is clear that

"liability in tort is an incident to occupation or control". *Cullings* v. *Goetz*, 256 N. Y. 287, 290 (1931); *Muscelli* v. *Frederick Starr Contracting Co.*, 296 N. Y. 330 (1947); *Stein* v. *Pershing Square Bldg. Co.*, 191 Misc. 30; *Iacono* v. *Frank and Frank Contracting Co., Inc.*, 259 N. Y. 377 (1932).

The New York Court of Appeals in *Kilmer* v. *White*, 254 N. Y. 64, defined the liability of a person parting with the control of premises on which a nuisance exists. It held:

> "One's liability in negligence for the condition of land ceases when the premises pass out of one's control before injury results. Such is the general law. * * * To this rule certain exceptions arise. The landlord is liable if he leases premises for the use of the public when he knows that they are unsuited therefor. The nature of the use creates the duty. * * * Other conditions may give rise to other exceptions. If the landlord has been guilty of conscious deception or has covenanted to repair, he is not exempt from liability for dangerous conditions.
>
> "Another exception for the benefit of the third parties may be noted. 'A person who has been in possession and control of premises on which a nuisance exists, and then leases or in other manner parts with control of the premises under circumstances from which inference may be drawn that he authorized its continuance or profited therefrom, may be held liable for any damages suffered by reason of the continuance of the nuisance thereafter.' Zolezzi v. Bruce-Brown, 243 N. Y. 490.
>
> "A nuisance may be a dangerous condition due to negligence. * * * But from the act of transfer of title and possession in itself no inference can arise that the vendor either authorized the continuance of the dangerous condition or intended to profit thereby. Zolezzi v. Bruce-Brown, supra.

"The question thus arises as to the liability of the vendor for dangerous conditions existing at the time when he unqualifiedly transfers title and possession to the vendee. A proper rule applicable to such cases has been proposed in Tentative Draft No. 4 of the Restatement of the Law of Torts of the American Law Institute as follows:

" 'SECTION 222. General Rule of Non-Liability for Dangerous Conditions Existing at Time Vendor Transfers Possession. Except as stated in Section 223, a vendor of land is not subject to liability for bodily harm caused to his vendee or others while upon the land after the vendee has taken possession by any dangerous condition, whether natural or artificial, which existed at the time that the vendee took possession.

" 'SECTION 223. Liabiliy for Concealed Dangerous Conditions Known to Vendor. A vendor of land who conceals or fails to disclose to his vendee any condition whether natural or artificial involving unreasonable risk to persons upon the land, is subject to liability for bodily harm caused thereby to the vendee and others upon the land in his right, after the vendee has taken possession, if (a) the vendee does not know of the conditions or the risk involved therein, and (b) the vendor knows of the condition and the risk involved therein and has reason to believe that the vendee will not discover the condition or realize the risk.' "

Clearly the jumper was not a concealed dangerous condition (fol. 193). Its existence was known to the government and its agencies because it had been inspected, approved and accepted by them, more than three years prior to the accident, and under the rulings of this case, these petitioners were clearly not liable for the injury sustained by respondent's intestate.

Inasmuch as the law of the State of New York governs the rule of liability, it is patent that the U. S. Court of Appeals misread and misapplied the law of liability.

Questions Presented

In dealing with the question of jurisdiction, we necessarily had to discuss the first two questions presented in this petition.

The third question is whether the decision at bar is in conflict with the State law in holding that the subsequent negligence of the owner would not insulate the contractor from liability.

In *Virginia Railway Co.* v. *Mullins,* 271 U. S. 220, this Court held:

> "Their maintenance and use during that period were exclusively in the hands of federal agents. If a duty rested on any one to make any change in them, it rested on the federal agents; and, if maintaining and using them without change was a wrong against the plaintiff, it was a wrong committed by those agents, for which no liability attached to the defendant."

The New York Court of Appeals in *Wilks* v. *New York Telephone Co.,* 243 N. Y. 357, quoted the foregoing and thereby made it the law of the State of New York.

The ruling of the trial court in directing a verdict was correct for the reason that the uncontradicted proof in the case showed that at the time of the accident, this pole and its equipment were in the sole control of a government agency and not in the control of any one of the defendants.

The fourth question presented deals with the rule of *res ipsa loquitur.* With the exception of the fact that the

Port Chester Electrical Construction Corp. installed the jumper, there is absolutely no evidence in the record as to when or why the jumper sagged and energized the guy cable. Respondent adduced no evidence as to the position of the jumper at the time it was installed and accepted. Burton testified that he could not tell and nobody would know why the jumper sagged (fols. 563-564). The only complaint concerning the construction of this jumper was that it was not fastened to a pole top pin. Burton, when he replaced the existing jumper, did not fasten same to a pole top pin (fols. 922-923), and testified that such installation was good construction.

Respondent admits that the accident occurred over three years after the work was accepted by and after it went into the sole control of the government. Yet, the Court of Appeals held that the sagging of the jumper was sufficient *prima facie* evidence to prove negligence on the part of petitioners, because of foreseeability that such a sagging was possible and that at some future time, a business visitor of the government might climb the pole and be injured thereby. In other words, it held that the happening of the accident was *prima facie* proof of negligence on the part of these petitioners and placed upon them the burden of explaining why the jumper sagged, although they were not in control of same and had had no opportunity for some three years to inspect or maintain same.

The New York Law on the application of this doctrine is stated in the case of *Breen* v. *N. Y. Central and H. R. R. Co.*, 109 N. Y. 297. As control is essential, it clearly follows that the decision of the Court of Appeals in ruling as it did, is in conflict with same.

A further reason why this petition should be granted and the decision reviewed is because this case is of great interest not only to contractors in the State of New York, but to contractors throughout the United States. This

Court will take judicial notice that when a general contractor undertakes the installation of work of the kind involved in this case, that he protects himself and his employer by liability insurance, from any and all liability for accidents that may occur during the progress of the work, and that he includes the cost of such insurance in the contract price. Such insurance protects the contractor only during the progress of the work and does not protect him from the moment the work is accepted and turned over to the owner. Under the ruling of the Court of Appeals, a prudent contractor would have to carry liability insurance for all future periods during which the installation made by him would be in use. This would necessarily entail inclusion in the contract price of a large sum of money for future protection from liability. This certainly has not been the business practice in the past, and should not become necessary in the future, because it has been a recognized principle of the law of negligence that liability for all accidents which occur after the work is completed and while the instrumentality is in possession of the owner, that the latter and no one else is responsible for the negligent maintenance of such instrumentality.

Conclusion

Since it is patent that the Court of Appeals erred in reversing the judgment of the District Court and holding as above stated, and since the questions presented are of general importance, and since the decision below conflicts with the law of the State of New York in several material respects, this petition for a writ of certiorari should be granted.

Respectfully submitted,

William A. Davidson,
Attorney for Petitioners.

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PETITIONERS' REPLY BRIEF

On the bottom of page 12 and the top of page 13 of her brief, respondent states that her case is not based upon the theory of nuisance, but is based solely on the theory of negligence.

Petitioners claim that the U. S. Court of Appeals erred in ruling as it did, even if assuming that petitioners, when they installed the jumper, created a nuisance.

On October 31st, 1949, the Appellate Division of the Supreme Court, Second Department, decided the case of

Brown, Respondent v. *Welsbach Corporation, and others Appellants,* which decision was reported in the New York Law Journal on November 1st, 1949, and has not yet been officially reported. For the convenience of the Court, we are quoting this decision in full:

> "Action to recover damages for injuries sustained as the result of alleged negligence of defendant, The Welsbach Corporation, in negligently constructing and maintaining a sidewalk over a lamp post foundation. Judgment for plaintiff, in so far as appealed from, reversed on the law with costs, and complaint dismissed on the law, with costs. The accident, involving a fall on a then exposed hole seven inches in diameter and five feet deep, occurred on September 14, 1947. Assuming negligence of said defendant in construction of the concrete covering over the foundation, it could not be held liable in the light of the acceptance by the City of New York of the work after its completion on January 23, 1947 (Coleman v. Guidone & Son, Inc., 192 App. Div. 120). In any event the contract between said defendant and the City of New York, incident to which the work was performed, had expired as of June 30, 1947, and hence defendant had no supervisory power and was out of control and no longer liable at the time of the accident under the applicable general rule at common law. (The Mayor, &c., of Albany v. Cunliff, 2 N. Y. 165; Cullings v. Goetz, 256 N. Y. 287, 290; Cunningham v. T. A. Gillespie Co., 241 Mass. 280; Board of Education, Union Free School District No. 6 of Town of North Hempstead v. Town of North Hempstead, 259 App. Div. 733.) This is not a case which is within the exceptions to the foregoing well-settled rule, which are (a) where there was retention of a financial interest (Covert v. Cranford, 141 N. Y. 521, 527; Swords v. Edgar, 59 N. Y. 28, 35); (b) Concealment of a defect (Kilmer v. White, 254 N. Y. 64,

70); or (c) lack of reasonable opportunity by a successor in control to discover the condition on prompt inspection (Pharm v. Lituchy, 283 N. Y. 130, 132). Findings of fact implicit in the jury's verdict are affirmed."

The facts in the instant case, while not entirely similar, are so analogous that the reasoning in the cited decision clearly applies. Assuming negligence of petitioners in the construction of the jumper, they cannot be held liable in the light of the acceptance by the Government of their work after its completion in May, 1943, because the contract between these petitioners and the Government, incident to which the work was performed, had been completed and hence these petitioners had no supervisory power and were out of control and no longer liable at the time of the accident under the applicable general rule at common law.

As argued in our main brief, this is not a case which is within the exceptions to the following well-settled rules, which are:

a. Where there was retention of a financial interest;

b. Concealment of a defect;

c. Lack of reasonable opportunity by a successor to discover the condition on prompt inspection.

The foregoing decision restates the law of the State of New York applicable to the facts in the instant case and conflicts with the interpretation of the New York law made by the U. S. Court of Appeals in the instant case.

Respectfully submitted,

WILLIAM A. DAVIDSON,
Attorney for Petitioners.

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Respondent.

Brief for Mary E. Person, as Administratrix of the Goods, Chattels and Credits of William S. Person, Deceased, in Opposition

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

October Term, 1949

No. 411

CAULDWELL-WINGATE COMPANY, INC., POIRIER & McLANE CORPORATION and PORT CHESTER ELECTRICAL CONSTRUCTION CORPORATION,

Petitioners,

against

MARY E. PERSON, as Administratrix of the Goods, Chattels and Credits of WILLIAM S. PERSON, Deceased,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief for Mary E. Person, as Administratrix of the Goods, Chattels and Credits of William S. Person, Deceased, in Opposition.

Opinion Below

The opinion of the United States Court of Appeals (R. 426-433) is reported in 176 F. (2nd)) 237.

Jurisdiction

The petition for a writ of certiorari was filed October 20, 1949. The jurisdiction of this Court is invoked by the petitioners under Section 240 (a) of the Judicial Code as amended. See also Rule 38 (5) (b).

Questions Presented

1. Whether the United States Court of Appeals has decided an important question of local law in such a manner as to conflict with applicable local decisions.

2. Whether the United States Court of Appeals erred in deciding that the respondent made out a *prima facie* case which should have been submitted to the jury in the United States District Court.

3. Whether the United States Court of Appeals erred in deciding that the respondent adduced sufficient evidence in the United States District Court to support a jury verdict against all the petitioners.

4. Whether the United States Court of Appeals erred in deciding that the respondent adduced sufficient evidence to justify a jury in finding that the petitioner, Port Chester, was engaged in the erection and construction of high tension wires which were inherently dangerous instrumentalities within the meaning of New York law.

5. Whether the United States Court of Appeals erred in deciding that the petitioners, Cauldwell-Wingate and Poirier & McLane, were under a duty to carefully supervise and inspect the work of their subcontractor, Port

Chester, because the work was inherently dangerous and therefor under New York law that duty could not be delegated.

6. Whether the United States Court of Appeals erred in deciding that the question of proximate cause of the decedent's death was plainly one of fact for the jury to decide.

7. Whether the United States Court of Appeals erred in deciding that the presence of a second unlawful act, if any there was, was legally irrelevant under New York law unless the second unlawful act was so unexpected that injury was not to be a reasonably foreseeable result of the first unlawful act.

8. Whether the United States Court of Appeals erred in deciding that the burden, under New York law, was upon the petitioners to prove that they had performed their work in accordance with plans and specifications and to satisfy a jury that such plans and specifications, if any there were, were not so patently dangerous that competent engineers would have thought them improper.

9. Whether the United States Court of Appeals erred in reversing the United States District Court, in remanding this cause for a new trial and in denying the petitioners a re-hearing.

Statement

The following statement is deemed necessary to correct some inaccuracies and to supply some important omissions in the petitioners' statement.

This action was brought by the respondent's intestate on behalf of herself and four dependent children to recover damages for the wrongful death of her husband pursuant to Section 130 of the Decedent Estate Law of New York (R. 18-20).

The petitioners rested at the close of the respondent's case without introducing any evidence whatsoever and then moved for a dismissal of the complaint and for a directed verdict. The trial judge granted their motions (R. 412-416).

The respondent established upon the trial that the work performed by these petitioners was inherently dangerous (R. 45, 56, 84, 176, 328).

That the type of construction used by the petitioners on pole No. 1422 was improper (R. 358).

That the jumper had been placed by the petitioner, Port Chester, between the two conductors on pole 1422 in such a manner as to introduce an extreme hazard to anyone working on the pole (R. 358).

That the jumper used by the petitioner, Port Chester, was a piece of bare, soft, malleable copper wire, uninsulated and charged with a deadly current of 2300 volts of electricity (R. 242, 243).

That this jumper was installed by the petitioner, Port Chester, suspended in mid air without any support whatsoever, either in the form of an insulated porcelain pole top or side top pin, which were in common use at the time and were and are used to prevent jumpers from bending sagging or falling down or in any way making contact with any metal or other object on a pole (R. 111, 122, 139, 190, 191, 295, 321, 323, 324).

That this jumper was installed by the petitioner, Port Chester, in this condition within a proximity of two inches

to a metal plate, also known as a metal square washer, which held fast an eye bolt, to which bolt was attached a guy line leading to the ground (R. 181, 204, 205).

The statement in petitioners' brief (Pet. 3) that the guy cable was bolted six inches below the high tension wire is not to be confused with the square metal plate or washer. The metal plate extended beyond the bolt. Before the highly charged bare jumper sagged, it was within a proximity of two inches to the plate (R. 180, 181, 204, 205). The jumper thereafter sagged, fell two inches and made contact with the metal plate, thereby charging the upper portion of the guy line with 2300 volts of electricity (R. 43, 76, 129, 130, 179, 180, 393, 400).

The uncontradicted testimony of the witness (Shaw), a highly competent expert, shows that there could not be any question, even as between experts, as to the negligent construction of this jumper because it was hazardous, the worst kind of a hazard (R. 359-361, 386, 387, 395, 401).

That the bolt which ran through the pole and held the dead end bell insulators and long high tension wires to which the jumper had been attached, was also negligently installed by the petitioner, Port Chester (R. 254, 259, 291, 292).

That this bolt had a nut and washer missing on the eye side and its threads on the other side were stripped. The threads on the nut attached thereto were also crossed. There were spaces on both sides of the bolt, as a result of which the dead end bells themselves were loose, enabling them to twist, turn, swing and sway. The wires attached thereto, including the jumper, were all charged with 2300 volts of electricity (R. 182-184). The witness (Burton) says that because of this condition, the jumper dropped down and made contact with the metal plate (R. 188-190, 202-205, 254, 291, 292).

The jumper and the high voltage wires were installed by Port Chester (R. 328-330). In its original position and before it fell there was a space of only two inches between the jumper and the metal plate (R. 181).

That a guy line is never used to transmit electricity. It is a heavy cable used to hold the pole in position and for no other purpose (R. 60, 68, 110, 132, 176).

The guy line had a strain insulator in it at a point approximately twenty feet from the ground. This protected animals and people on the ground from a short circuit, but it afforded no protection to workers on the pole because it did not contain a strain insulator at a point beneath the high tension wires (R. 392).

That the bare jumper fell two inches, made contact with the metal plate and energized the upper portion of the guy line with 2300 volts of electricity because it was wholly unsupported and uninsulated and had been placed within a proximity of two inches to the plate. Further, the bolt itself, which held the entire rigging was loose. The bells were loose, causing the high tension wires and the jumper attached thereto to swing and sway. This is what killed the decedent. This was the type of construction used by the petitioners (R. 181-184, 190, 191, 203, 254, 259, 291, 292).

Decedent climbed the pole and grasped the upper portion of the upper guy line in order to adjust himself in his belt. He was not working in the high tension area. He was working in the low tension area. The secondary wires had only 110 volts of electricity in each one. As he grapsed the guy line, which must at all times be neutral, 2300 volts of electricity passed through his body and killed him instantly (R. 36, 70, 72, 84, 86, 123, 127).

There was no reason for the petitioners to use this type of construction in the first place, because it was improper and hazardous (R. 358).

A proper type of construction would have been to use a single high tension line running from pole 1426 to accident pole 1422 to pole 776, supported by a single insulated ridge pin attached to accident pole 1422 or supported by a pair of ordinary double wooden buck cross arms. This type of construction would have been economical and safer (R. 359-361, 393).

There was no evidence to indicate any intervening cause between the day the petitioners completed the work and the day of the accident.

There are no plans and specifications in evidence to show that the petitioners performed their work in accordance therewith.

The burden was upon the petitioners to produce them if any there were. They promised to produce them, but never did (R. 330). They rested without introducing any evidence at all.

The petitioners, Cauldwell-Wingate and Poirier & McLane, did not even conduct the usual pole top or climbing inspection upon completion of the work to see to it that the work was properly done (R. 338, 381).

Argument

1. This case involves the original erection, construction and supervision by the petitioners of high voltage electric wires charged with a deadly current of 2300 volts. That this type of work comes within the category of inherently dangerous instrumentalities there can be no question under New York law. See *Van Leet* v. *Kilmer* (252

N. Y. 454); *Morhard* v. *Richmond Light & R. R. Co.* (111 A. D. 353); *Webster* v. *Richmond Light & Railroad Co.* (158 A. D. 210); *Buell* v. *Utica Gas & Electric Co.* (259 N. Y. 443); *Braun* v. *Buffalo General Electric* (200 N. Y. 484); *Caglione* v. *Mt. Morris Electric Light Co.* (56 A. D. 191); *Ferrari* v. *N. Y. C. R R. Co.* (244 A. D. 182, affd. 250 N. Y. 527); *Burrows* v. *Livingstone Niagara Power Co.* (217 A. D. 206, affd. 244 N. Y. 548).

2. Liability in such cases is not incident to operation and control.

Where one performs work which is of an inherently dangerous character, in a negligent manner, he cannot evade responsibility by contending that he was not in control of the instrumentality at the time of the accident. See *MacPherson* v. *Buick Motor Co.* (217 N. Y. 382); *Thomas* v. *Winchester* (6 N. Y. 397); *Statler* v. *Ray Mfg. Co.* (195 N. Y. 478); *Procopowicz* v. *11 West 42nd St.* (289 N. Y. 350); *Regan* v. *825th St. Corp.* (287 N. Y. 179); *De Haen* v. *Rockwood Sprinkler Co.* (258 N Y. 350).

It is interesting to note that the petitioners make no mention, either in their petition for a writ, or in their supporting brief of the cases cited *supra*. It is well known that these cases are landmarks in the New York law. In such cases liability is definitely not incident to control.

Wilks v. *N. Y. Telephone Co.* cited by the petitioners (Pet. 6) sustains respondent's claims. There the court found that the "Federal Company" was not in control of the defective system at the time of the accident. The company had turned over its defective system to another company. The court held (P. 362), "If the evidence sustains the charge that the defendant "Federal company" did erect the wires in such a manner as to make it a menace to others, the verdict against it must be sustained."

The United States Court of Appeals in the instant case applied local law in conformity with the New York decisions.

3. The petitioners, Cauldwell-Wingate and Poirier & McLane, were general contractors. They had subcontracted the work of erecting an outside electrical distribution system to their subcontractor, Port Chester. The work involved the erection of high voltage lines which are definitely inherently dangerous instrumentalities. They were under a duty to inspect and supervise the work of Port Chester and to see to it that it was properly done. The contractors cannot escape responsibility in such a case. They cannot delegate such a duty to others. It is a non-delegable duty under New York law. See *Engel* v. *Eureka Club* (137 N. Y. 100); *Rohlfs* v. *Weil* (271 N. Y. 444); *Hanley* v. *Central Savings Bank* (255 A. D. 542, affd. 280 N. Y. 734); *Kuhn* v. *P. J. Carlin Construction Co.* (154 Misc. 892); *Walters* v *Rao Electrical Co.* (289 N. Y. 57); *Semanchuck* v. *5th Ave. and 37th St. Corp.* (290 N. Y. 412).

4. In the instant case there were no intervening causes to break the chain of causation between the time that the petitioners completed their work and the date of the accident. If any there were, they must be such under New York law as not to have been reasonably foreseen at the time the petitioners erected the jumper and the high tension wires. Here the subcontractor erected a jumper within a proximity of two inches to a metal plate. The jumper was charged with 2300 volts of electricity. It was bare, soft, malleable copper wire, uninsulated and wholly unsupported by any form of safety device such as a simple insulated porcelain pole top pin or side top pin. Under the circumstances, it was clearly foreseeable that such a jumper would bend, sag or fall down and make contact with the metal place two inches below and that it would thereby charge the metal plate and the metal guy wire leading therefrom with such a dangerous

voltage. That is exactly what happened (R. 181, 190, 191, 242, 243). See *Carlock* v. *Westchester Lighting Co.* (268 N. Y. 345).

5. The petitioners urge performance in accordance with plans and specifications. There is not a single plan or specification in evidence to prove that the rigging on accident pole 1422 was done in accordance therewith. The petitioners rested at the close of the respondent's case without introducing any evidence at all (R. 412, 415). The petitioners did not raise such a defense in their pleadings (R. 9-15).

Under New York law, the defense has the burden of pleading and proving affirmatively the defense of plans and specifications. Further, they must also show that they relied upon them and that a reasonable inspection of such plans and specifications by competent persons would not disclose that they were faulty or improper. The petitioners did not do this. See *Hardie* v. *Boland Co.* (205 N. Y. 336); *Ryan* v. *Feeney & Sheehan Building Co.* (239 N. Y. 43); *Sheridan* v. *Rosenthal* (206 A. D. 279); *Hooey* v. *Airport Construction Co.* (253 N. Y. 486).

6. The cases cited by the petitioners do not apply. *Western Union Telegraph Co.* v. *Postum* (256 U. S. 662) (Pet. 6) deals with common law liability of a telegraph Co. for the negligent delay of a message. *U. S.* v. *General Motors Corp.* (323 U. S. 373) (Pet. 9) involves the interpretation of the 5th Amendment of the United States Constitution and was before this Court because the case presented a question upon which the Federal Courts were in conflict. There is no such question in the instant case. *Wilks* v. *N. Y. Telephone Co.* (243 N. Y. 351) (Pet. 10) has not been adequately set forth. There the "Federal Company," although out of control at the time of the accident, was held responsible. The court found (P. 362) that "If the evidence sustains the charge that the Federal company

did erect the wire in such a manner as to make it a menace to others, the verdict against it must be sustained." *Covert* v. *Cranford* (141 N. Y. 521) (Pet. 11) does not deal with an inherently dangerous instrumentality. *Mayor* v. *Cunliff* (2 N. Y. 174) (Pet. 11) held no recovery because of lack of privity between the wrong doer and the injured. This is not New York law today. *Cullings* v. *Goetz* (256 N. Y. 287) (Pet. 12) is a landlord and tenant case and belongs to that group of New York cases which predicate liability upon operation and control. It does not deal with inherently dangerous instrumentalities. *Muscelli* v. *Frederick Starr Contracting Co.* (296 N. Y. 330) (Pet. 12) deals with the application of the "Osceola" doctrine as to unseaworthiness and not with tort liability in negligence. *Stein* v. *Pershing Square Bldg. Co.* (191 Misc. 30) (Pet. 12) is another landlord and tenant case having no application. In *Iacono* v. *Frank and Frank Contracting Co., Inc.* (259 N. Y. 377) (Pet. 12) the court found (P. 381) that "Neither of the defendants had caused its installation, or supplied it for the use of the subcontractor; neither of them had ever possessed or operated." There the defendants neither created, controlled or supplied the instrumentality for use. *Kilmer* v. *White* (254 N. Y. 64) and *Zolezzi* v. *Bruce-Brown* (243 N. Y. 490) (Pet. 12) are also landlord and tenant cases. The *Zolezzi* case specifically holds the landlord not liable because he did not erect the sign. *Virginian Railway Co.* v. *Mullens* (271 U. S. 220) (Pet. 14) deals with a nuisance which the defendant neither created nor controlled. *Breen* v. *N. Y. Central and H. R. R. Co.* (109 N. Y 297) (Pet 15) is a passenger case which does not apply in fact or in law.

In the case at bar the petitioners are the original actors. They perpetrated the original wrongful act. They, in the language of Mr. Justice Cardozo in *De Haen* v. *Rockwood Sprinkler Co.* (258 N. Y. 350) were the ones who placed an engine of destruction in a position where a heedless touch by another awoke its destructive powers.

7. The opinion of the United States Court of Appeals (R. 426-441) is in conformity with New York law. That court applied local law in accordance with the doctrine of *Erie R. R. Co.* v. *Tompkins* (304 U. S. 64).

8. The trial court erred seriously when it ignored the practice of the United States District Court for the Southern District of New York and refused to allow the respondent's case to go to the jury on triable issues of fact. The trial court should have reserved decision on a motion to dismiss or for a directed verdict until all of the evidence was in and thereby prevent needless expense and circuity of action. There were clearly triable issues of fact to be submitted to the jury in accordance with the rulings of this Court. See *Lumbra* v. *U. S.* (290 U. S. 552); *Gunning* v. *Cooley* (281 U. S. 90); *Gulf M. & N. R. Co.* v. *Wells* (275 U. S. 455); *Chicago, Milwaukee & St Paul R. Co.* v. *Coogan* (271 U. S. 472). See also Hughes Federal Practice (Vol. 6, Section 3825, P. 363), "It is the duty of the court, in considering a motion to direct a verdict to take that view of the evidence most favorable to the party against whom it is desirable that the verdict shall be directed, and to determine the matter from that evidence, and reasonable and justifiable inferences therefrom."

9. There is no distinction under New York law between negligence and a nuisance which has its origin in negligence. See *MacFarlane* v. *City of Niagara Falls* (247 N. Y. 340); *Delaney* v. *Philhern Realty Holding Corp.* (280 N. Y. 461). In the language of Cardozo, Ch. J., in the *MacFarlane* case (P. 345) "Very often the sufferer is at liberty to give to his complaint either one label or the other. It would be intolerable if the choice of a name were to condition liability."

The respondent's case is not based upon the theory of a nuisance or upon *res ipsa loquitur* as the petitioners seem to urge (Pet. 5, 11).

The respondent's case is based on negligence. The original negligent construction by Port Chester of an inherently dangerous object in such a manner that the same was a menace to others in general and to the respondent's intestate in particular. It was the duty of the petitioners, Cauldwell-Wingate and Poirie & McLane, as general contractors, to see to it that Port Chester performed its work with a high degree of care and under New York law that duty could not be delegated.

10. The petitioners urge, as an added reason for the granting of this petition, that otherwise a prudent contractor would have to carry liability insurance for all future periods (Pet. 15, 16). This argument is untenable apart from the fact that they are substantial corporations.

11. The petitioners do not present any substantial question requiring review by this Court. See *McArthur* v. *U. S.* (315 U. S. 787); *Zucht* v. *King* (260 U. S. 174).

The United States Court of Appeals has decided that the respondent made out a *prima facie* case which should have been submitted to the jury under local law (R. 426-441). This question should not be subject to review by the United States Supreme Court. See *U. S.* v. *Socony-Vacuum Oil Co.* (310 U. S. 150, re-hearing denied 310 U. S. 658).

The petitioners will have ample opportunity to defend themselves once again upon the new trial.

CONCLUSION

The petition for a writ of certiorari presents no question requiring further review by this Court. It is therefore respectfully submitted that the same should be denied.

Louis A. D'Agosto,
Counsel for Respondent.